IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 686.

GUY A. THOMPSON, Trustee of the MISSOURI PACIFIC RAILROAD COMPANY, a corporation,

Petitioner,

vs.

LOUISE F. McPHERSON, Administratrix of the Estate of JASON B. McPHERSON, Deceased.

BRIEF OF RESPONDENT LOUISE F. McPHERSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SPRINGFIELD, MISSOURI COURT OF APPEALS.

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SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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I.

Jurisdiction.

It is the contention of respondent that there is no question of substance presented for review by petitioner; that there is nothing before this Court except the sufficiency of evidence to establish negligence on the part of petitioner and that the Court should decline to review said decision.

II.

Respondent's Statement.

This is an action under the Federal Employers' Liability Act for damages for the wrongful death of Jason B. McPherson, respondent's husband. There was a judgment for five thousand dollars ($5,000.00) affirmed by Springfield Court of Appeals, State of Missouri. Petition for writ of certiorari to Supreme Court of Missouri denied.

The deceased was employed by the petitioner as a section foreman. With a crew of four men he was returning home after the day's work. They were riding on a gasoline motorized hand-car (hereafter referred to as motor car) driven by Ted Strohm, petitioner's employee, who had been operating the car for many years [R. 16-17-18]. The car is about six feet long [Ex. E]. The operator sits near the middle of the car on the left side. There is a footboard along each side of the car. The employees sit sidewise of the car with their feet on this footboard; the body, unless turned, is at right angles to the direction the car moves [Exs. E and F]. At the time of deceased's injury and death the car was moving north. At a point where it crosses 39th street, the track runs north and south. Thirty-ninth street is a paved public highway, descends a few degrees down a hill from the west to the railroad track, and runs east and west [R. 15].

The highway was covered with ice and snow. The deceased sat at the northeast corner of the car; behind him were Haines and Shoemaker. McFarland, another employee, sat on the west side of the car just behind Strohm [R. 15-16].

North of the highway the track makes a wide turn to the east [R. 37, Ex. B]. It was the deceased's duty to watch for oncoming trains around this curve, for broken rails and ties and for the approach of vehicles on the highway [R. 24]. It was the duty of each employee to keep a lookout for vehicular traffic on the highway. The deceased sat two or three feet forward from Strohm. The motor car had been running ten or twelve miles an hour, slowed down to three or four miles an hour about 50 feet south of the highway [R. 15-16]. The crossing at the highway was 24 feet wide, the highway 18 feet wide. From a point 26 feet south of the south edge of the highway the men on the motor car had an unobstructed view for 137 feet up the hill to the west [Ex. D, R. 41]. From 18 to 20 feet south of the crossing there was an unobstructed view to the top of the hill which was about 400 feet.

For the deceased to observe a vehicle on the highway approaching the railroad track from the west it was necessary for him to make a complete turn.

Plaintiff called as witnesses; Haines and McFarland, both section foremen in the employ of the defendant at the time of trial. McFarland testified that as they approached the highway although facing the west, instead of looking to the west for traffic from that direction he looked towards the east and continued to look east until the motor car, traveling only three or four miles an hour, had reached the middle of the crossing when he first looked towards the west and saw a large truck approaching 100 feet away, traveling 40 or 45 miles an hour [R. 16-17]. He said when they reached a point 10 feet south of the highway he could have looked to the west and seen

the truck coming three or four hundred feet away [R. 18]. He testified when he first saw the truck:

"It was slipping and sliding on the pavement."

When the motor car reached a point about six or eight feet south of the south edge of the highway crossing, the deceased gave Strohm a signal to come ahead. When the motor car reached the middle of the highway about 20 feet beyond where the come ahead signal was given, McFarland first saw the truck 100 feet up the hill. Since the truck was traveling 15 times as fast as the motor car it is manifest that the truck was over the hill and not in sight when the deceased ordered Strohm to proceed.

The truck driver testified the truck was traveling 15 miles per hour. If that were true the truck was approximately 200 feet up the hill when the order was given to come on across. Ordinarily it would be perfectly safe to cross in front of a vehicle 200 feet away traveling 15 miles per hour.

But after the order to proceed was given Strohm instead of whipping up and moving on, continued the pace of three to four miles per hour all the way across the highway, 24 feet, and to a point 30 feet beyond. When the truck ran to a point near the tracks, it turned and proceeded northward parallel with the tracks for thirty feet until it came to a shoulder and had to cross the tracks [R. 28]. It was not until then that the motor car ran into the side of the truck.

The operator of the truck testified [R. 27-28]:

"When I first saw this car coming I tried to stop. I put on the brakes * * *. My truck begun weaving from side to side on the ice and I came right on down there until I got pretty close to the tracks

> * * * and I took right down the railroad track going north the same way the motor car was going. I crossed the tracks down there about 30 feet north of the crossing * * * as my truck crossed the track we had a collision. * * * When I came north I came up to that shoulder, I had to go across the tracks. As I turned to go across the tracks that is when the collision happened. My front wheels had already crossed, the rear wheels were not yet across."

He testified that the motor car struck the truck at the right-hand door, back of the front right fender, and under the grain bed [R. 28].

The evidence disclosed that the motor car could have been stopped any time in from six to eight feet.

Petitioner did not call Strohm the driver. With reference to Strohm's duty Haines testified [R. 24]:

> "Mr. Strohm was operating the car and it was his duty to watch and stop in case of emergency. He should watch for trains and traffic and any thing that was on the tracks, the traffic on the highway and the trains also. It was his *duty* to stop if he saw *danger* regardless of what Mr. McPherson might have *motioned* or *said* or *done.*"

The petition charged, 1st, that the operator of the motor car negligently failed to stop the motor car before colliding with the truck after he saw or could have seen the truck approaching the crossing slipping and sliding and out of the driver's control; and 2nd, that the driver of the motor car negligently drove the motor car across the path of the truck while the latter was so close that it created an imminent danger of collision therewith. And plaintiff's instruction (1) submitted both of those issues [R. 55-56].

III.

ARGUMENT.

Summary of the Argument.

1. There is no question of substance submitted for review.
2. The opinion does follow the decision of this Court of questions of negligence under the Federal Employer's Liability Act.
3. There is strong and convincing evidence that defendant was negligent and that deceased was free from negligence.
4. The opinion is not based on speculation and conjecture.

A.

As foreman of the section crew it was the duty of deceased to ride at the right front end of the motor car to watch for trains, inspect the track, watch for vehicular traffic at public crossings, and to signal the operator of the motor car whether or not he should go on across. While it was the duty of Strohm to obey the signals of his foreman, it was likewise his duty to look out for trains, traffic on the highway, and to stop if he saw danger regardless of what his foreman might have ordered or directed [R. 24]. The deceased did not have absolute control of the motor car as stated by the Springfield Court of Appeals. He could not put on the brakes or manipulate the machinery so as to go forward. That duty fell to Strohm.

It was the duty of deceased to give signals and orders and to exercise ordinary care in so doing, it then became

the duty of Strohm to execute those orders with the same degree of care.

If the deceased was guilty of primary negligence in giving an order or signal which proximately resulted in his death it is elementary law that his representative could not recover damages for such negligent act. This is the gist of the cases relied on by petitioner, which we shall notice more in detail presently. In all of those cases it was admitted that the primary negligence of the injured or deceased was the proximate cause of the resulting tragedy. And in none of the cases was the Last Clear Chance Doctrine applicable or involved.

In the case here the overwhelming evidence and physical facts demonstrate that the deceased was not guilty of any negligence at all; the jury so found, and the judgment was approved by the Appellate Courts.

It is readily apparent that when the deceased gave the signal to go ahead the truck was nowhere in sight or was so far away that it was perfectly safe for the motor car to proceed across the highway. When the signal was given the motor car was eight feet south of the crossing; the motor car traveled three to four miles per hour; when it reached the middle of the highway, which is 24 feet wide, and had gone 20 feet, the truck was 100 feet away. If the truck was going 45 miles an hour before the brakes were applied it was running three times as fast as the motor car. While the motor car traversed that 20 feet the truck traveled 300 feet; it was therefore 400 feet away when the signal was given. If so it was not in sight. Was the deceased guilty of primary negligence in giving a signal under those circumstances? Manifestly not. The truck driver said he was traveling

15 miles an hour. If so he traveled five times as fast as the motor car and he was 200 feet away when the signal was given. Is it negligent to pass in front of a slow moving vehicle when it is 200 feet away? Certainly not.

Manifestly when the brakes were applied the speed of the truck was cut down so that the truck would travel the last 150 feet in approximately the same time the motor car would run 42 feet to the point of collision.

The physical facts support the contention of the truck driver that after almost reaching the track he turned north and ran 30 feet parallel with the track.

When deceased gave the signal to come on he had a right to assume his order would be obeyed; that the motor car would promptly speed up to twelve miles and cross the highway. He was not negligent in making such assumption and therefore, not required to look again for oncoming vehicles. To a man of ordinary prudence the way was clear. At any rate failure to look again would amount to nothing more than contribtory negligence and that is not a defense in cases under the act.

Rocco v. Lehigh Valley Ry. Co., 288 U. S. 275.

The Springfield Court of Appeals was correct when it said the deceased did not have absolute control of the motor car. After he signaled come ahead, he had done all it was physically possible for him to do. Thereafter the operation of the car was in the hands of Strohm and he failed to operate it with due care. Had he carried out the order of his foreman, the collision would have been averted.

Petitioner's Cases.

In *Unadilla Valley Ry. Co. v. Caldine,* 278 U. S. 139, Caldine the conductor negligently failed to obey an order to stop his train and lost his life. Primary negligence. Obviously he could not recover.

In *Freze v. C. B. Q.,* 263 U. S. 1., the Court held Freze could not recover because he negligently failed to ascertain whether the other train had passed. He could not pass this responsibility to a subordinate.

Davis v. Kennedy, 266 U. S. 147, is not in point. There Kennedy, the engineer, failed to look for a train and was killed. The Court correctly held his representative could not recover on the ground that some inferior servant might have prevented his death.

St. Louis S. W. Ry. Co. v. Simpson, 286 U. S. 346, is not applicable. There Simpson negligently violated a written order to wait for another train.

Nor does *Great Northern Railway Co. v. Wiles,* 240 U. S. 441, help petitioner, because the Court held that Wiles primary negligence was the sole and proximate cause of his death.

None of the above cases help the petitioner under the facts as they appear from the record in this case. That is why the Springfield Court of Appeals failed to consider them.

The more recent case of *Rocco v. Lehigh Valley Ry. Co., supra,* is more closely in point with the case at bar. That case considers and comments on all of the above cases cited by petitioner and distinquishes them from *Rocco* as well as from the case here. It says, "In each of them the decedent's negligence was the proximate and efficient cause of the accident."

The case at bar is stronger even than *Rocco* because it was admitted that Rocco was guilty of contributory negligence.

The Supreme Court of Missouri in *Good v. M. K. T. Ry. Co.*, 97 S. W. (2d) 617, clearly distinguishes the case cited by petitioner from the case at bar. It says:

> "In Unadilla Val. Ry. Co. v. Caldine, 278 U. S. 139; Frese Admin. v. C. B. Q. R. Co., 263 U. S. 1; Davis v. Kennedy Admin., 266 U S 147 and Great Northern Ry. Co. v. Wiles, 240 U. S. 444, the negligence of the deceased, in violation of some personal duty imposed by rule of defendant company or by statute designed for the protection of himself and others in the situation confronting him, was considered the primary cause of the events directly resulting in his death, unaccompanied by the negligence of another or others directly contributing to the resulting events and consequences thereof and chargeable to the defendant."

In other words in those cases the deceased violated some personal duty imposed by rule for his protection. What duty did deceased violate here? None. It was his duty to look and signal at crossings, which he fully performed.

Petitioner assumes a position contrary to the facts as shown by the record. It begins with the false premise, that deceased negligently ordered Strohm to proceed across the highway in the face of imminent danger and that it was Strohm's duty to obey; that he did so and as direct result of his own carelessness he lost his life. This position is contrary to the physical facts and not supported by the evidence. None of the witnesses testified as to where the truck was when the signal was given; the physi-

cal facts demonstrate it was so far away that it was not negligent to cross at the time and place, if the motor car had been operated in the usual and customary manner and with ordinary care. The proximate cause of the tragedy in the first analysis was the failure of Strohm to put on the gas and go ahead; in the second place his failure to stop after the truck driver turned up the track and was exerting every reasonable effort to avoid a collision.

The case of *Illinois Central Ry. Co. v. Skaggs,* 240 U. S. 66, is in point. Skaggs, a head brakeman, gave the engineer a signal to back up; got on the tender of the engine and while looking back for a signal was crushed between the tender and a standing car at a switch. The company contended Skaggs was injured solely as a result of his own negligence; Skaggs testified the rear brakeman told him the clearance was sufficient and he relied on that statement. In affirming a judgment for Skaggs this Court said:

> "It may be taken for granted that the Statute does not contemplate a recovery by an employee for the consequences of action exclusively his own * * * but on the other hand it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused his injury * * *. If the injury resulted in 'whole or in part' from the negligence of any of the other employees, it is liable under the express terms of the Act."

See, also:

Norfolk & Western v. Earnest, 229 U. S. 114.

Last Clear Chance.

Again, the petitioner's driver, Strohm, had the last clear chance to stop and thereby save the life of decedent after he had negligently failed to obey the order of deceased to proceed ahead promptly. Strohm saw or should have seen the truck. The presumption is that he did see it. He was not called as a witness but had he appeared, he could not have denied these facts; the truck was huge. [See Ex. G, R. 47]; It was broad daylight; it approached full in his face; it turned and ran along beside the track for 30 feet; it ran side by side for some distance with the motor car; it passed it; Strohm could not be heard to say he did not see this truck any more than a traveler on the highway could deny that he saw an unobstructed railroad track or a train in front of him. When he saw the truck approaching he should have speeded up and gone by, but failing to do that, he should have stopped when the truck started north and was in the clear.

Haines and McFarland gave as their conclusions that had the truck gone straight ahead it would have passed behind the motor car. It may have done so. But the gross negligence of Strohm in loitering along, caused the truck driver, in an effort to avert the collision, to turn up the track. Had Strohm speeded up clearly the truck could and would have gone across behind him. After it turned to the north it ran across half the width of the highway and 30 feet further before it was compelled to turn and cross the tracks. Strohm could have stopped at any time in from six to eight feet and avoided the collision; and during all of that time the deceased was helplessly in the hands of Strohm. Even if deceased had been negligent in giving the signal which he was not, yet that

negligence, if any, would have become the remote cause and the subsequent negligence of Strohm, the proximate cause of his death. That fact distinguishes this case from those cited by petitioner, *viz., Caldine, Freze, Kennedy et al.*

See:

Armstrong v. Mobile and Ohio R. R. Co., 55 S. W. (2d) 465 (Mo. Sup.); certiorari denied 289 U. S. 743-753, 77 L. Ed. 149;

Jenkins v. Wabash Ry. Co., 107 S. W. (2d) 204 (Mo. App.); certiorari denied 302 U. S. 737.

The Opinion Is Not Based on Speculation or Conjecture.

The negligence of Strohm in failing to proceed promptly is not a matter of speculation or conjecture. It is admitted by all of the witnesses in the case that the motor car ran from three to four miles per hour and never changed its speed. That was a proximate cause of the collision. It was not a matter of conjecture as to whether or not Strohm could stop the motor car in six to eight feet. That likewise was admitted. It was clearly a question for the jury as to whether Strohm could and should have stopped the motor car and avoided the collision during the time the truck was running parallel with the track. That was likewise a proximate cause of the collision. For a moment while the truck was slipping and sliding toward the track, Strohm may have been in doubt whether to stop or speed up, but after the truck made the turn to the north and while it was running along by the side of the motor car, and passed same, which the physical facts demonstrate it did, the motor car should have been stopped,

and Strohm was clearly guilty of negligence in not then and there doing so. At least this was an issue for the jury.

In *Choctaw, Okahoma & Gulf R. R. Co. v. McDade,* 191 U. S. 64, this Court affirmed the judgment which defendant contended was based on speculation and conjecture. A water spout extended over a railroad track about the height of a man's head. McDade was last seen on top of a furniture car. His body was found 675 feet beyond the water spout. He had bruises on his head. The Court said:

> "It was left to the jury under proper instructions to find whether McDade came to his death in the manner stated in the declaration."

Myers v. Pittsburg Coal Company, 233 U. S. 184, is in point. Myers lost his life in a coal mine. Defendant contended the judgment was based on speculation and conjecture. This Court said:

> "We think the jury might well have found in view of the place at which the body of Myers was found, near to the wire, with his cap gone from his head that he came in contact with that wire and was thrown to the ground, and that he survived from the contact with the wire, carrying the voltage which it did and while in this situation was run over and killed by the approaching motor car."

In *Union Pacific R. R. v. Huxoll,* 245 U. S. 535, a railroad employee was knocked down and run over by a locomotive. The engineer did not see him or know that he had been struck but received a wash out signal to stop.

He could have done so in 15 or 16 feet but ran 100 feet or more. It took an hour to release Huxoll during which time he died. This Court held that it was a jury issue as to whether or not the deceased's life might have been saved had the locomotive been stopped promptly.

Manifestly the verdict in this case was not based on speculation and conjecture.

We respectfully submit that the petition to the Springfield Court of Appeal of the State of Missouri for a writ of certiorari should be denied.

Very respectfully submitted,

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